Supreme Court, U.S.
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NO. 88-1661

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RICHARD RIST, ACTING WARDEN
SOUTH DAKOTA STATE PENITENTIARY,

Petitioner,

v.

STEVEN SATTER,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF SOUTH DAKOTA

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO JURISDICTIONAL STATEMENT

Petitioner invokes this Court's jurisdiction under the provisions of 28 U.S.C. § 1257(3); 28 U.S.C. § 2101(c) and Rules 20.2 and 20.4 of this Court. The Petitioner and counsel apologize to the Court for improper citation of 28 U.S.C. § 1254(1) as the jurisdictional statute, and request

that this Court review the matter under § 1257(3), the proper statute.

REPLY TO CONSTITUTIONAL PROVISIONS

Respondent has cited a South Dakota constitutional provision. This provision is not cited to, nor is it relied upon, by the South Dakota Supreme Court decision sought to be reviewed.

REPLY TO STATEMENT OF THE CASE

In reply to Respondent's Statement of the Case, Petitioner states as follows:

1. The cause of the conversation with Sheriff Berg is plain. It was accurately described in the Petition. Petitioner acknowledges that Berg questioned Satter about bodies; that he did so intentionally; and that he did so without Miranda warnings. None of this affects the voluntariness of the statements in the due process sense.

2. The record is unclear as to all of the subjects of Respondent's polygraph

examinations, but it does indicate that one subject was these murders (HCT 69; App 314; App 126). Respondent does not deny the factual premise, set forth at Petition 11, that he did fail all polygraph examinations that related to these murders. Reply Brief 3-4.

3. It was not improper to refer to Petitioner's 1977 escape. The escape occurred long before the instant habeas petition, although the affidavit detailing the event was executed on February 14, 1989. APP 370-375.

REPLY TO RESPONDENT'S REASONS FOR DENYING THE WRIT

I

PETITIONER HAS PROPERLY INVOKED THIS COURT'S JURISDICTION.

Counsel for Respondent has correctly pointed out an error in citation of the statute providing this Court with jurisdiction. Petitioner acknowledges the

error, and extends his apology to the Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) not § 1254(1) as was erroneously set forth in the Petition. Petitioner believes that this error is not fatal to this Court's jurisdiction, and Respondent has cited no authority to the contrary. The question is whether this Court has jurisdiction, not whether Petitioner cited the correct statute.

II

THE DECISION BELOW DOES CONFLICT WITH OREGON v. ELSTAD, 470 U.S. 298 (1985).

In his reply on the merits, Respondent argues that, since the South Dakota Supreme Court did not decide that the subsequent statements to Agent Peterson were inadmissible, the decision does not conflict with Oregon v. Elstad, supra. This argument overlooks and misapprehends the Petition.

The Petition seeks review of the South Dakota court's holding that an extensive "fruit of the poisonous tree" analysis must be undertaken when voluntary, fully warned statements follow unwarned, although voluntary, statements. Elstad held that such an analysis is not necessary, and no "clear break" between the statements need be shown, where the prior, unwarned statement was voluntary in the due process sense. 470 U.S. at 307-308; 310-311. This holding has been applied in the cases set out in the Petition, n.1 at 23-25. In addition, a similar question is presented in Duckworth v. Eagan, No. 88-317, cert. granted, 57 U.S.L.W. 3259; argued March 29, 1989.

Respondent does not address the harmless error issue. It is plain, however, that any analysis of harmless error is significantly affected by the question of the admissibility of the statements to Agent Peterson, and

whether or not a "clear break" or "fruit of the poisonous tree" analysis is required before their admission.

CONCLUSION

Improper citation of this Court's jurisdictional statutes in a petition for certiorari should not be fatal, and has been corrected by this reply brief. The decision below does conflict with Elstad and other decisions. It imposes a substantial, unjustified burden on South Dakota law enforcement. Respondent therefore requests that the petition for certiorari be granted.

Dated this 5th day of May, 1989.

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